

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT TREVINO,

Plaintiff,

v.

D. ENGLER, et al.,

Defendants.

Case No. CV 10-0620-SVW (JEM)

MEMORANDUM AND ORDER
DISMISSING COMPLAINT WITH LEAVE
TO AMEND

On February 1, 2010, Robert Trevino ("plaintiff"), a state prisoner proceeding pro se and in forma pauperis, filed a civil rights complaint pursuant to 28 U.S.C. § 1983 ("Complaint").

SCREENING STANDARDS

In accordance with the provisions governing in forma pauperis proceedings, the Court must screen the Complaint before ordering service to determine whether the action: (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2). This screening is governed by the following standards:

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: (1) the plaintiff fails to state a cognizable legal theory; or (2) the plaintiff has

1 alleged insufficient facts under a cognizable legal theory. Balistreri v. Pacifica Police Dep't,
 2 901 F.2d 696, 699 (9th Cir. 1990). In determining whether a complaint states a claim on
 3 which relief may be granted, allegations of material fact are taken as true and construed in
 4 the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir.
 5 1989). However, "the liberal pleading standard . . . applies only to a plaintiff's factual
 6 allegations." Neitzke v. Williams, 490 U.S. 319, 330 n.9 (1989). "[A] liberal interpretation of
 7 a civil rights complaint may not supply essential elements of the claim that were not initially
 8 pled." Bruns v. Nat'l Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting
 9 Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

10 Although a complaint "does not need detailed factual allegations" to survive
 11 dismissal, a plaintiff must provide "more than mere labels and conclusions, and a formulaic
 12 recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly,
 13 550 U.S. 544, 555 (2007) (rejecting the traditional "no set of facts" standard set forth in
 14 Conley v. Gibson, 355 U.S. 41 (1957)). The complaint must contain factual allegations
 15 sufficient to rise above the "speculative level," Twombly, 550 U.S. at 555, or the merely
 16 possible or conceivable. Id. at 557, 570.

17 Simply put, the complaint must contain "enough facts to state a claim to relief that is
 18 plausible on its face." Id. at 570. A claim has facial plausibility when the complaint presents
 19 enough facts "to draw the reasonable inference that the defendant is liable." Ashcroft v.
 20 Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009). This standard is not a probability
 21 requirement, but "it asks for more than a sheer possibility that a defendant has acted
 22 unlawfully." Id. A complaint that pleads facts that are merely consistent with liability stops
 23 short of the line between possibility and plausibility. Id.

24 In a pro se civil rights case, the complaint must be construed liberally to afford
 25 plaintiff the benefit of any doubt. Karim-Panahi v. Los Angeles Police Dept, 839 F.2d 621,
 26 623 (9th Cir. 1988). Before dismissing a pro se civil rights complaint for failure to state a
 27 claim, the plaintiff should be given a statement of the complaint's deficiencies and an
 28 opportunity to cure. Id. Only if it is absolutely clear that the deficiencies cannot be cured by

1 amendment should the complaint be dismissed without leave to amend. Id. at 623; see also
 2 Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995).

3 After careful review and consideration of the Complaint under the relevant standards
 4 and for the reasons discussed below, the Court finds that plaintiff has failed to state a claim
 5 on which relief may be granted and **ORDERS** the Complaint **DISMISSED WITH LEAVE TO**
 6 **AMEND.**

7 **PLAINTIFF'S ALLEGATIONS**

8 Plaintiff alleges that, on or about December 30, 2009, he filed an emergency
 9 administrative appeal concerning his "illegal detention and/or false imprisonment" in
 10 Administrative Segregation ("Ad-Seg") at the California Men's Colony-East ("CMC-East") in
 11 San Luis Obispo, California. (Complaint at 2.) It appears that, in his administrative appeal,
 12 Plaintiff claims he was transferred from Pleasant Valley State Prison approximately seven
 13 months previously and wrongfully placed in Ad-Seg at CMC-East, rather than being
 14 transferred to the general population at Kern Valley State Prison ("KVSP"). (Complaint at
 15 3C.) He sought an immediate transfer to KVSP. (Id.)

16 Plaintiff appears to allege seven separate claims. First, he claims that Appeals
 17 Coordinator D. Engler acted with deliberate indifference in violation of the Eighth
 18 Amendment by refusing to adjudicate his administrative appeal on an expedited basis.
 19 (Complaint at 3A-D.) Second, plaintiff claims that Engler violated plaintiff's Fourteenth
 20 Amendment right to due process by refusing to adjudicate his administrative appeal on an
 21 expedited basis. (Complaint at 4A-B.) Third, plaintiff claims that unnamed correctional
 22 officers failed to return his legal materials. (Complaint at 4B.) Fourth, plaintiff claims that
 23 Engler failed to adjudicate the administrative appeals in order to retaliate against plaintiff for
 24 having filed an earlier civil rights action in the Eastern District of California. (Complaint at
 25 2A, 4A.) Fifth, plaintiff claims that Correctional Officer J. Neighbors used excessive force
 26 against plaintiff while he was handcuffed and returning from the shower, causing him to
 27 suffer a head injury. (Complaint at 5B-C.) Sixth, plaintiff claims that, when he filed an
 28 administrative appeal against Neighbors for the excessive force incident, Engler failed to act

1 on the appeal because he filed the appeal against Neighbors. (Complaint at 5C.) Finally,
 2 plaintiff claims that other unnamed officers have made “death threats” against plaintiff
 3 because he filed the appeal against Neighbors. (Id.)

4 Plaintiff seeks injunctive relief and compensatory and punitive damages. (Complaint
 5 at 7.)

6 DISCUSSION

7 The Court, having reviewed the Complaint pursuant to the standards set forth above,
 8 has determined that all but one of Plaintiff’s claims do not withstand screening for the
 9 following reasons:

10 I. Plaintiff Must Name All Defendants In the Caption

11 Plaintiff names only defendants Engler and Neighbors in the caption of the
 12 Complaint. (Complaint at 1.) In the body of the Complaint, however, Plaintiff makes
 13 allegations against various unnamed correctional officers not named in the caption. (See,
 14 e.g., Complaint at 3A, 3B, 4B, 5C, 5D.)

15 The individuals or entities not named in the caption have not been presented properly
 16 as parties, and the Court does not recognize them as defendants in this action. If plaintiff
 17 files an amended complaint, he must include in the caption the name of each defendant
 18 against whom he is asserting a claim. See Fed. R. Civ. P. 10(a); Local Rule 11-3.8(d); see
 19 also Ferdik v. Bonzelet, 963 F.2d 1258, 1262-63 (9th Cir. 1992) (dismissing action for
 20 refusal to comply with court orders to name defendants in the caption). The Court will not
 21 order the United States marshal to serve the amended complaint on any defendant not
 22 identified in the caption.

23 II. Plaintiff Fails to State an Eighth Amendment Claim Against Engler

24 Plaintiff claims that Engler violated his rights under the Eighth Amendment by failing
 25 to process his administrative appeal on an expedited basis. The Eighth Amendment
 26 prohibits the imposition of cruel and unusual punishments and “embodies ‘broad and
 27 idealistic concepts of dignity, civilized standards, humanity and decency.’” Estelle v.
 28 Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir.

1 1968)). A prison official violates the Eighth Amendment only when two requirements are
 2 met: (1) the deprivation objectively must be “sufficiently serious,” Farmer v. Brennan, 511
 3 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 298, (1991)); and (2) the
 4 prison official subjectively must have a “sufficiently culpable state of mind.” Id. (quoting
 5 Wilson, 501 U.S. at 298). The objective requirement that the deprivation be “sufficiently
 6 serious” is met where the prison official's act or omission results in the denial of “the minimal
 7 civilized measure of life's necessities.” Id. (quoting Rhodes v. Chapman, 452 U.S. 337, 347
 8 (1981)). The subjective requirement that the prison official has a “sufficiently culpable state
 9 of mind” is met where the prison official acts with “deliberate indifference” to inmate health
 10 or safety. Id. (quoting Wilson, 501 U.S. at 302-303). A prison official acts with deliberate
 11 indifference when he “knows of and disregards an excessive risk to inmate health or safety.”
 12 Id. at 837. “[T]he official must both be aware of facts from which the inference could be
 13 drawn that a substantial risk of serious harm exists, and he must also draw the inference.”
 14 Id.

15 Plaintiff has not alleged sufficient facts to demonstrate how failure to adjudicate his
 16 appeal regarding his placement in Ad-Seg and transfer to KVSP on an expedited basis
 17 deprived him of the minimal civilized measure of life's necessities or posed a substantial risk
 18 of serious harm to his safety. Accordingly, plaintiff has not stated a claim against Engler for
 19 deliberate indifference under the Eighth Amendment.

20 **III. Plaintiff Fails to State a Due Process Claim**

21 The Due Process Clause protects prisoners from being deprived of liberty without
 22 due process of law. Wolff v. McDonnell, 418 U.S. 539, 556 (1974). In order to state a claim
 23 for deprivation of due process, a plaintiff must first establish the existence of a liberty
 24 interest for which the protection is sought. Liberty interests may arise from the Due Process
 25 Clause itself or from state law. Hewitt v. Helms, 459 U.S. 460, 466-68 (1983). Liberty
 26 interests created by state law are generally limited to freedom from restraint which “imposes
 27 atypical and significant hardship on the inmate in relation to the ordinary incidents of prison
 28 life.” Sandin v. Conner, 515 U.S. 472, 484 (1995).

1 “There is no single standard for determining whether a prison hardship is atypical and
 2 significant, and the ‘condition or combination of conditions or factors . . . requires case by
 3 case, fact by fact consideration.’” Ramirez v. Galaza, 334 F.3d 850, 861 (9th Cir. 2003)
 4 (citation omitted). However, the courts should consider: (1) whether the challenged
 5 condition mirrored those conditions imposed upon inmates in administrative segregation and
 6 protective custody and is thus within the prison's discretionary authority to impose; (2) the
 7 duration of the condition and the degree of restraint imposed; and (3) whether the state's
 8 action will invariably affect the duration of the prisoner's sentence. Id. “If the hardship is
 9 sufficiently significant, then the court must determine whether the procedures used to
 10 deprive that liberty satisfied Due Process.” Id. at 860.

11 **A. Claim Against Engler for Failure to Process Inmate Appeals**

12 Plaintiff claims that his due process rights were violated when two of his inmate
 13 appeals were not processed quickly. Plaintiff has not shown that this delay resulted in an
 14 “atypical and significant hardship” or that the procedures used to deprive him of his liberty
 15 interest did not satisfy due process. See Ramirez, 334 F.3d at 860-61. Thus, Plaintiff has
 16 failed to allege cognizable claims under the due process clause against Engler for delay in
 17 acting upon plaintiff's administrative appeals.

18 **B. Claim Against Unnamed Correctional Officers for Loss of Property**

19 Plaintiff also appears to claim that his due process rights were violated when
 20 unnamed correctional officers failed to return some of his legal materials. (Complaint at
 21 4B.) He indicates that he filed another administrative appeal regarding this matter on or
 22 about December 7, 2009, but does not state the outcome. (Id.) The Due Process Clause
 23 protects prisoners from being deprived of property without due process of law, Wolff v.
 24 McDonnell, 418 U.S. 539, 556 (1974), and prisoners have a protected interest in their
 25 personal property. Hansen v. May, 502 F.2d 728, 730 (9th Cir. 1974). A negligent
 26 deprivation of property does not violate the Due Process Clause when adequate
 27 post-deprivation remedies are available because pre-deprivation process is impracticable
 28 since the state cannot know when such deprivations will occur. Hudson v. Palmer, 468 U.S.

517, 533 (1984). Similarly, an intentional, but unauthorized, deprivation of property does not violate the Due Process Clause when adequate post-deprivation remedies are available. Id. California law provides an adequate post-deprivation remedy for any unauthorized property deprivations. Barnett v. Centoni, 31 F.3d 813, 816-17 (9th Cir. 1994) (citing Cal. Gov. Code §§ 810-895). Plaintiff has filed an administrative complaint regarding this loss of property. He does not claim that the complaint process was constitutionally inadequate. Moreover, as set forth above, defendants who are not identified in the caption of the Complaint, either by name or as Doe defendants, are not defendants in this action. Accordingly, plaintiff has failed to state a claim arising out of the loss of his legal materials.

IV. Plaintiff Has Failed to State a Retaliation Claim

In the prison context, allegations of retaliation against a prisoner's First Amendment rights to speech or to petition the government may support a § 1983 claim. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985). “[A] viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (citations omitted). Plaintiff has the burden of proving that the exercise of his First Amendment rights was a substantial or motivating factor behind defendant's conduct. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989). Plaintiff need not show an actual chilling effect, only that defendant's actions “would chill or silence a person of ordinary firmness from future First Amendment activities.” Rhodes v. Robinson, 408 F.3d 559, 568-69 (9th Cir. 2005) (internal quotations and citation omitted). A claim of retaliation against a prisoner's First Amendment rights is actionable even if the acts, when taken for different reasons, would have been proper. Mt. Healthy, 429 U.S. at 283-84.

A. Claim Against Engler for Retaliation

Plaintiff alleges that Engler refused to process on an expedited basis plaintiff's administrative appeal regarding his placement in Ad-Seg and transfer to KVSP because he had filed another civil rights complaint in the Eastern District of California. Plaintiff also alleges that Engler refused to process plaintiff's administrative appeal regarding the excessive force incident with Neighbors because he had filed that complaint.

Plaintiff has not made the requisite showing that Engler undertook "adverse action" against plaintiff by failing to process the appeals in the time demanded by plaintiff or that retaliation was a substantial or motivating factor behind Engler's conduct. Plaintiff has not alleged facts demonstrating that he was entitled to a faster adjudication of his administrative appeals or that he suffered harm as a result of the allegedly untimely process. Moreover, plaintiff's allegations regarding Engler's motivations do not rise above the "speculative level," Twombly, 550 U.S. at 555, or the merely possible or conceivable. Id. at 557, 570. Plaintiff does not allege "enough facts to state a claim to relief that is plausible on its face." Id. at 570.

B. Claim Against Unnamed Correctional Officers for Retaliation

Plaintiff alleges that unnamed correctional officers made "death threats" against him because he had filed an administrative appeal against Neighbors. (Complaint at 5C.) As set forth above, the unnamed correctional officers are not defendants in this action because they are not identified in the caption of the Complaint. If plaintiff wishes to pursue this claim, he must identify these officers in the caption, either by name or as Doe defendants. He also must specifically articulate the threats and indicate by whom and when they were made in order to show that they constituted "adverse action" and that retaliation was the substantial or motivating factor behind them.

V. Plaintiff Adequately States a Claim for Excessive Force

Plaintiff claims that, in or about July 2009, he was showering and Neighbors ordered him to step out of the shower. When plaintiff did not comply immediately, Neighbors shut off the water and escorted plaintiff back to his cell. As plaintiff entered his cell, with his hands

1 cuffed behind his back, Neighbors slammed plaintiff's head into the wall, causing a large
 2 lump and a laceration to his head. (Complaint at 5B-C.) Plaintiff contends that the force
 3 was excessive because he was in handcuffs and was not exhibiting any threatening
 4 behavior. (Id. at 5B.)

5 An officer's use of excessive force violates the Eighth Amendment only when the
 6 inmate is subjected to the "unnecessary and wanton infliction of pain." Hudson v. McMillian,
 7 503 U.S. 1, 6-7 (1992) (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)). To decide
 8 whether force inflicts "unnecessary and wanton" pain, courts must determine "whether force
 9 was applied in a good-faith effort to maintain or restore discipline, or maliciously and
 10 sadistically to cause harm." Hudson, 503 U.S. at 6-7. "The Eighth Amendment's prohibition
 11 of 'cruel and unusual' punishment necessarily excludes from constitutional recognition *de*
 12 *minimis* uses of physical force, provided that the use of force is not of a sort 'repugnant to
 13 the conscience of mankind.'" Id. at 9-10 (internal citations omitted).

14 For purposes of screening, plaintiff arguably has set forth enough facts to state a
 15 claim against Neighbors for excessive force. Plaintiff has alleged sufficient facts to indicate
 16 the force imposed was not necessary to maintain discipline and that it was applied
 17 maliciously and sadistically to cause harm.

18 * * * * *

19 For the reasons set forth herein, the following claims are **DISMISSED WITH LEAVE**
 20 **TO AMEND:**

- 21 1. Plaintiff's claim against Engler for deliberate indifference in violation of the
- 22 Eighth Amendment.
- 23 2. Plaintiff's claim against Engler for violation of the Due Process Clause of the
- 24 Fourteenth Amendment.
- 25 3. Plaintiff's claim against unnamed correctional officers for loss of his legal
- 26 materials in violation of the Due Process Clause of the Fourteenth
- 27 Amendment.
- 28

1 4. Plaintiff's claims against Engler for retaliation in violation of the First
2 Amendment.

3 5. Plaintiff's claim against unnamed correctional officers for retaliation in violation
4 of the First Amendment.

5 If Plaintiff desires to pursue this action, he is **ORDERED** to file a First Amended
6 Complaint within **thirty (30) days** of the date of this Order, which remedies the deficiencies
7 discussed above. Defendant must name separately each individual defendant against
8 whom he brings his claims, identify clearly the basis for each of his claims, and articulate the
9 connection between each named defendant and each claim.

10 If Plaintiff chooses to file a First Amended Complaint, it should: (1) bear the docket
11 number assigned in this case; (2) be labeled "First Amended Complaint"; (3); be filled out
12 exactly in accordance with the directions on the form; and (4) be complete in and of itself
13 without reference to the previous Complaint or any other pleading, attachment or document.
14 The Clerk is directed to provide Plaintiff with a blank Central District of California civil rights
15 complaint form, which Plaintiff must fill out completely and resubmit. Plaintiff must write
16 legibly.

17 **Plaintiff is admonished that, if he fails to file a First Amended Complaint by the**
18 **deadline set herein, the Court will recommend that this action be dismissed on the**
19 **grounds set forth above for failure to prosecute and for failure to comply with a Court**
20 **order.**

21
22 DATED: March 3, 2010

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE